

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4503

Heard in Montreal, October 13, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Failure to accommodate Conductor W. Khan.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On October 20, 2013, Mr. Khan went off work due to medical disability secondary to an off-duty injury. Since that time, however, the Company has failed to provide Mr. Khan with suitable accommodation.

The Union contends that the Company has a duty to accommodate Mr. Khan's medical disability to the point of undue hardship. The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship. The Union contends that the Company's actions are contrary to the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*.

The Union seeks a finding that the Company has breached the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*, and a direction that the Company cease and desist from said breaches. The Union further seeks an order that Mr. Khan be made whole for his losses with interest due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees and denies the Union's request.

FOR THE UNION:

(SGD.) B. Hiller

General Chairman

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

C. Clark – Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
W. Apsey – General Chairman, Smiths Falls
R. Moffat – Legislative Representative, Toronto
W. Khan – Grievor, Mississauga

AWARD OF THE ARBITRATOR

Nature of the Case

1. The Teamsters Canada Rail Conference (TCRC) grieves the accommodation the Canadian Pacific Railway Company (CP) provided to Conductor Waheed Khan following his abrupt development of a disability. CP has provided two accommodation opportunities from the time Mr. Khan first had restrictions to the point of his anticipated retirement at the end of 2016.

2. The TCRC alleges CP did not satisfy its duty to accommodate and has requested compensation for the days when Mr. Khan did not work outside the provided accommodated opportunities.

3. For the reasons which follow, while the arbitrator accepts that some aspects of CP's search did not go far enough, the circumstances do not support a claim for the requested compensation. A declaration will be issued.

The Duty to Accommodate

4. Duty to accommodate cases require an examination of both the employer's duty to accommodate and the employee's duty to do his or her work. The Supreme Court of Canada (SCC) has established a framework for these types of cases.

5. The SCC's framework includes these guiding principles:

- the standard at issue in innocent absenteeism cases is one which requires an employee to perform services for his/her employer on a regular basis¹;
- to show that the attendance standard is reasonably necessary, the employer must show that the employee cannot be accommodated without undue hardship²;
- Undue hardship does not require proving that further accommodation would be impossible³;
- the duty to accommodate does not “completely alter the essence of the contract of employment, that is, the employee’s duty to perform work in exchange for remuneration”⁴;
- the employer’s duty does not require changing the workplace in a fundamental way, but does include arranging “the employee’s workplace or duties to enable the employee to do his or her work”⁵;
- the employee and his/her trade union have an important role to play in the search for accommodation⁶;
- the employer’s duty is discharged if an employee turns down a reasonable accommodation proposal⁷;
- undue hardship is contextual and includes factors like cost, interchangeability of the workforce and facilities and interference with other employees’ rights⁸;
- the arbitrator’s analysis must examine the entire period of the accommodation⁹; and
- the employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future¹⁰.

¹ [British Columbia \(Public Service Employee Relations Commission\) v. BCGSEU, \[1999\] 3 SCR 3, 1999 CanLII 652 \(Meiorin\)](#)

² [Meiorin at paragraph 54](#)

³ [Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 \(SCFP-FTQ\), \[2008\] 2 SCR 561, 2008 SCC 43 at paragraph 12](#)

⁴ [Hydro-Québec at paragraphs 14-15](#)

⁵ [Hydro-Québec, at paragraph 12](#)

⁶ [Meiorin, at paragraph 65](#)

⁷ [Central Okanagan School District No. 23 v. Renaud, \[1992\] 2 SCR 970, 1992 CanLII 81](#)

⁸ [Meiorin, at paragraph 63](#)

⁹ [McGill University Health Centre \(Montreal General Hospital\) v. Syndicat des employés de l'Hôpital général de Montréal, \[2007\] 1 SCR 161, 2007 SCC 4 at paragraph 33](#)

¹⁰ [Hydro-Québec, at paragraph 19](#)

6. In [CROA&DR 4273](#), Arbitrator Picher described the importance of the process in duty to accommodate cases:

I agree with counsel for the Union that it was not sufficient for the Company to determine whether there were vacant positions into which the grievor could be placed. The duty of accommodation goes further, requiring the employer to consider whether various job functions can be bundled together to create a sufficiently productive accommodated position. Additionally, the obligation of scrutiny on the part of the employer, and for that matter on the part of the Union, extends beyond the bargaining unit and can encompass managerial responsibilities or work in relation to another bargaining unit, subject only to the limitation of undue hardship.

7. An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding if an employer has been sufficiently diligent in pursuing accommodation opportunities.

Chronology of Events

8. CP hired Mr. Khan in January, 1999.
9. As the record illustrates, Mr. Khan experienced some serious health issues in the fall of 2013. He remained unfit for all duties for the remainder of the year.
10. In January, 2014, Mr. Khan was cleared to return to work on modified duties, but not for the “usual duties” of his conductor position. He could not drive CP vehicles or operate moving equipment.

11. Mr. Khan's initial Functional Abilities Form (FAF) for Safety Critical Positions provided a prognosis of a full recovery, but indicated his restrictions would continue for more than three months in the future.

12. The evidence conflicted whether Mr. Khan decided he did not want to return to any running trades position.

13. CP alleged that the TCRC advised CP's Return to Work Manager in February, 2014 that Mr. Khan did not wish to return to a running trades position, but wanted to explore other opportunities at CP. CP referred to this position of Mr. Khan in several grievance letters to the TCRC, as well as in its internal communications (Company Record; February 5, 2014 emails).

14. A review of the record indicates that CP's position did not appear to be contested, though it is noted that the TCRC at paragraph 22 of its Brief stated that its comment merely indicated that Mr. Khan's restrictions prevented him from working in a safety critical running trades position.

15. Mr. Khan was eager to work. He stayed in regular contact with CP. At CP's request, Mr. Khan prepared a resume which contained the stated objective of obtaining a position in the civil engineering field. The TCRC assisted him by taking proactive steps to help identify accommodated positions.

16. CP's Return to Work Specialist (RWS) advised Mr. Khan that due to the temporary nature of his restrictions, she would only be searching for temporary accommodations rather than permanent work. In that same February, 2014 email, the RWS advised Mr. Khan of a management position in Mississauga (Union's Brief; Tab 11; Company Brief; February 26, 2014 email). CP alleged Mr. Khan did not apply for that position.

17. In April, 2014, the RWS, a TCRC representative and Mr. Khan met to discuss accommodation. In or about May, 2014, CP raised the possibility of an engineering position in Sudbury. Due to the temporary nature of the position, and the need for a significant move which would take him away from his treating physicians, Mr. Khan declined to pursue that opportunity.

18. The RWS also raised the possibility of Mr. Khan meeting with its Deputy Engineer, but Mr. Khan was never contacted.

19. In the spring of 2014, CP considered flagging positions, but Mr. Khan's restrictions from doing safety sensitive positions prevented this possibility. The RWS suggested an engineering position in British Columbia, but Mr. Khan did not want to relocate.

20. CP first provided Mr. Khan with a temporary accommodation in August, 2014. The TCRC had identified a possible position for Mr. Khan in July, 2014 as a Line-up Analyst. CP created the Line-Up Analyst position as part of a line-up improvement project.

21. Mr. Khan performed this position for almost a year until June 25, 2015. On that date, CP informed Mr. Khan that the project on which he had been working had been suspended. CP again asked Mr. Khan to provide his resume.

22. In August, 2015 CP provided Mr. Khan with a list of available positions, but they all required relocation. The TCRC identified a possible flagging position for Mr. Khan in the fall of 2015, but CP advised it had assigned it to another restricted employee requiring accommodation (Union's Brief; Tab 34).

23. In April, 2016, CP offered Mr. Khan a temporary position in its Public Works Department in Mississauga. Mr. Khan is scheduled to continue to work in this position, and another one, until his planned retirement on December 31, 2016.

Analysis and Decision

24. The parties dispute the scope of this grievance. CP argued that the December 29, 2014 grievance concerned any accommodation up to that point in time. It disputed that that grievance could cover future events arising after the end of the initial accommodation in June, 2015. The TCRC argued that the grievance covered the entire period of Mr. Khan's accommodation.

25. Given the disposition of this grievance, the scope issue is moot.

26. The TCRC argued that CP looked only for existing and available positions, rather than also examining bundling other duties when trying to accommodate Mr. Khan. It highlighted its own role in identifying the accommodated positions Mr. Khan did receive.

27. CP submitted that it satisfied its ongoing duty to accommodate through a diligent investigation of numerous possibilities. It faced the challenge of Mr. Khan not being able to work in safety sensitive positions, including in his original position as a conductor. He could not drive vehicles and would not relocate to other areas.

28. In CP's view, this made accommodation difficult. Despite these challenges, CP argued it provided Mr. Khan with two different accommodated positions.

29. The arbitrator has decided the proper remedy is to issue a declaration. The TCRC demonstrated that CP could have conducted a broader search for accommodation beyond existing vacancies to include the possible bundling of duties as noted by Arbitrator Picher in [CROA&DR 4273](#). CP did look for other opportunities outside the bargaining unit, including those which might use Mr. Khan's engineering talents.

30. The arbitrator accepts that the search for work for Mr. Khan was complicated by several factors. Though the evidence is in conflict, the record discloses that CP certainly understood from the TCRC that Mr. Khan did not want to return to a running trades

position. Mr. Khan also advised he could not accept work outside Toronto (Union's Brief; Tab 31).

31. Within this restricted search window, Mr. Khan did not apply for a management position in Mississauga which the RWS mentioned to him in a February, 2014 email. The record did not disclose why Mr. Khan did not pursue this suggestion. Mr. Khan was also not willing to relocate for possible engineering positions, including one in Sudbury.

32. The desire not to relocate is understandable, especially when someone is under the care of a specialist. But those decisions remain relevant in examining an employer's diligence when trying to accommodate an employee with significant restrictions and preferences.

33. The arbitrator upholds the grievance, in part. By way of remedy, a declaration is issued noting that CP's efforts to accommodate include not only canvassing existing, available positions, but requires looking at modifying positions, or bundling various duties, when searching for a productive position for an employee requiring accommodation.

November 4, 2016



GRAHAM J. CLARKE
ARBITRATOR